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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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| UNITED STATES OF AMERICA, | ) | CRIM. NO. 84-2417 |
| Plaintiff, | ) | |
| vs. | ) | |
| RONALD REWALD, | ) | |
| Defendant. | ) | |



ORDER DENYING MOTION TO RECONSIDER

On April 22, 1985, an in camera hearing was held on defendant's motion to compel further discovery of CIA-related documents. In particular, the defendant had moved this court to compel the government to provide further discovery on thirteen areas relating to his defense. At the hearing the court made specific findings as to each of those categories and ruled that the defendant was not entitled to further discovery.

On May 1, 1985, the court filed an order denying the defendant's motion to compel. In that order the court did not set forth its findings as to each of the defendant's thirteen categories because the court was concerned that doing so would result in the disclosure of classified information.

The defendant now moves this court to reconsider its order denying the motion to compel. In the alternative, the defendant asks that this court set forth in writing the basis of its ruling on defendant's thirteen categories, pursuant to section 6(a) of the Classified Information Procedures Act

("CIPA"), 18 U.S.C. app. III § 6(a). The court, having reviewed defendant's motion to reconsider, the memoranda filed in support and opposition thereto, finds as follows:

CIPA § 6(a) does not require the court to enter written findings as to discovery orders. CIPA § 6(a) states in part:

> (a) Motion for Hearing. --- Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classfied information that would otherwise be made during the trial or pretrial proceeding. . . . As to each item of classified information, the court shall set forth in writing the basis for its determination.

This section only requires the court to set forth in writing the basis of its rulings as to the use, relevance, or admissibility of classified information at trial or in pretrial proceedings. Section 4 of CIPA governs discovery proceedings, and does not contain any provision which requires the court to set forth in writing any of its rulings.

Nevertheless, in order to make clear the basis for the court's ruling, the court will now set forth, in a manner which does not disclose any classified information, its findings as to each of defendant's thirteen categories. The court will then address the additional issues raised by the defendant in his motion for reconsideration.

## Motion to Compel

On January 18, 1985, the defendant served 1,717 interrogatories upon the government. The government objected to many of those interrogatories on the ground of relevance. In his motion to compel, the defendant merely stated that he wished the court to compel the government to answer all of the interrogatories to which the government had objected on the ground of relevance. The defendant did not address specific interrogatories, nor did he explain how any of the requested information would be relevant to his defense.

Rather than simply deny the defendant's motion for failure to present any specific issue for the court's review, the court directed the defense to submit a list of the categories of information to which the government objected and which the defense believes is properly discoverable. The defendant then submitted thirteen such categories.

The court will address each of those thirteen categories in turn. In ruling upon those categories, the court is guided by Rule 16 of the Federal Rules of Criminal Procedure and by Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. The defendant is entitled to discover that information for which there exists "a substantial basis for claiming materiality." United States v. Agurs, 427 U.S. 97, 106 (1976).

In determining what information may be material to Rewald's defense, the court looks to his six proposed defenses:

--- truth, as a defense to the perjury counts;

--- no scheme to defraud;

--- lack of specific intent;

--- reasonable reliance on apparent authority;

--- outrageous government conduct; and

--- entrapment.

More specifically, defendant claims that the CIA used Bishop, Baldwin, Rewald, Dillingham & Wong ("BBRDW") as a proprietary organization and promised to reimburse Rewald for all expenses incurred in pursuit of CIA-related activities.

The court first addresses the categories designated A.1, A.3, and C.

A.1. This "category seeks information regarding CIA ties to all persons who at any time did work as an employee of Bishop, Baldwin."

A.3. This "category of questions deals with those persons who used the cover provided by Bishop Baldwin and its related companies."

C. This category "asks questions regarding cover operations." Defendant claims "it is important to know precisely what projects were engaged in by the agents using the cover provided by Rewald."

As stated by the court at the hearing on March 15, 1985, the defendant is entitled to discover information regarding any CIA employees who acted in a management capacity in any of the BBRDW companies, or who were involved in the disbursement or distribution of the monies of those companies. To the extent that these three requests seek more than this, they are DENIED.

The mere fact that a CIA agent may have used a BBRDW entity as a cover does not entitle the defendant to discover the nature of those covert activities. Such information is not material to the development of any of the defendant's six proposed defenses.

The court next addresses categories A.2, A.5, A.7, B.1, B.2, and B.3.

A.2. This "category seeks information regarding the relationship between Rewald and certain officials of the CIA."

A.5. This "category involves those foreign persons whom the CIA directed Rewald to make contact with and cultivate for intelligence gathering purposes."

A.7. This "category involves those persons of the Federal Bureau of Investigation who were aware of the CIA's relationship with Rewald prior to the closing of Bishop Baldwin. . . . Rewald contends that, at the direction of the local CIA station chief, he consulted FBI head Bill Erwin about the legality of his involvement in selling arms to other countries."

B.1. This "category seeks information regarding the various arms sales Rewald was engaged in at the direction of the CIA."

B.2. This "category seeks information regarding the intelligence gathering missions which the CIA directed Rewald to engage in."

A.3. This "category seeks information regarding a miscellaneous group of projects which Rewald engaged in at the direction of the CIA."

The defendant is entitled to discover information related to whether CIA officials directed him to engage in any of the activities charged in the indictment. The defendant is entitled to know, for example, whether CIA officials directed him to create BBRDW, or whether the CIA promised to cover any of his investment losses. This does not entitle the defendant, however, to discover "the full extent of the involvement of the CIA in Bishop Baldwin activities."

Similarly, any purported involvement of Rewald or Bishop Baldwin in the sale of arms to foreign countries or foreign intelligence-gathering is immaterial to the defendant's case. If, for example, the CIA specifically directed Rewald to use BBRDW funds for the sale of arms to foreign countries, that information would be material and discoverable. The mere fact that one or more BBRDW employee may have been involved in the sale of arms, however, has no relevance to the preparation of any of the defendant's six proposed defenses. To the extent that these categories seek such immaterial information, these requests are DENIED.

The court turns next to category A.4.

A.4. This "category of questions deals with those persons of the CIA who invested in Bishop Baldwin accounts."

The court has previously stated that the defendant is entitled to discover whether any of the Bishop Baldwin investors did so at the direction of the CIA. To the extent that the defendant seeks to know the nature of any investor's affiliation with the CIA, and exactly what projects any investor may have engaged in for the CIA, that information is immaterial and not properly discoverable, and the request is DENIED.

The court turns next to request A.6.

A.6. This "category involves those persons who had an independent relationship with the CIA that in some fashion brought them into contact with Rewald for CIA-related purposes."

Because this request is vague, nebulous, and presents nothing specific for the court's review, the request is DENIED.

The court turns next to category B.4.

B.4. This "category seeks information regarding two separate incidents directly involving CIA efforts to cover up its extensive involvement with Rewald and the affairs of Bishop Baldwin."

This court previously ordered the government to turn over any exculpatory information discoverable under Brady. Thus, if during these purported cover-up incidents the CIA or other agency uncovered information which is exculpatory on any of the charges in the indictment, the government is obligated to disclose such information. Further, if there are documents which show that exculpatory information was removed and

destroyed by the CIA, such documents are discoverable. To the extent that this request seeks more than this, the request is DENIED.

Finally, the court turns to category D.

D. This "section asks questions focusing primarily on Rewald, Bishop Baldwin, and the CIA," and, in particular, "information regarding the general practices of the CIA when using contract agents and setting up proprietary organizations."

Defendant has presented no basis for this request. The court has already ordered the government to disclose any information which shows that Rewald committed any acts charged in the indictment at the direction of CIA officials. Evidence of CIA internal guidelines or manuals regarding how the CIA has acted in similar situations would at best go to proof of a collateral matter and is not material to Rewald's defense. Accordingly, this request is DENIED.

It should be noted that as to some of these categories, either no documents exist or any arguably relevant documents have already been produced. For example, category B.1 seeks information regarding arms sales Rewald allegedly engaged in at the direction of the CIA. The government denies that the CIA ever directed Rewald to engage in arms sales, and therefore no relevant documents exist.

Also, the government has produced scores of documents regarding the use of BBRDW entities for cover operations. See

categories A.3, C. Similarly, the government has released to the defense numerous documents related to any knowledge by the the government of Rewald's alleged involvement in arms deals. See category A.7.

After considering all of the objections raised by the defendant, both those addressed in the court's May 1, 1985 order and those addressed here, the court concludes that the government has fully complied with court's March 15, 1985 discovery order and will not compel further discovery on CIA-related issues.

## Motion for Reconsideration

In his motion for reconsideration, defendant argues that the court has only permitted him to discover evidence directly related to the 100-count indictment, and that the court has prevented him from discovering essential circumstantial evidence. Defendant argues that he is entitled to discover and explore any links between himself and the CIA, because such evidence makes more probable the proposition that BBRDW was in fact established by the CIA as a proprietary organization and that the CIA promised to reimburse him for all expenses incurred in pursuit of CIA-related activities.

In determining what information may be material to the development of Rewald's defense, the court has predicated its rulings on the assumption that the defendant's version of the facts is accurate. See, e.g., United States v. Bailey, 444 U.S. 394 (1980); United States v. Bifield, 702 F.2d 342 (2d Cir.),

cert. denied, 103 S. Ct. 2095 (1983). It is for this reason that the court has ordered the government to turn over any and all information which implicates the CIA in the creation of BBRDW, in the direction and management of BBRDW, or in the disposition of the investors' funds.

Information which shows that employees of the CIA solicited investors for BBRDW or directed the investments of the company may be material to Rewald's defense. The very fact that an employee of the CIA was a consultant or director of the company may likewise be material.

If, however, while serving as a consultant for BBRDW a CIA employee engaged in covert activities for the CIA and those activities in no way involved the disposition of the investors' funds, the defendant is not entitled to discover the nature of those covert activities. Those activities simply have no relevance to charges of mail and securities fraud. Disclosing such information to the trier of fact would not make "more probable or less probable" the proposition that the CIA directed the disposition of $20,000,000 of privately invested funds. See Fed. R. Evid. 401.

The fact that an investor in BBRDW may have been an employee of the CIA may be relevant to Rewald's defense. That fact alone, however, does not entitle the defendant to discover the extent of the investor's affiliation with the CIA or to discover information detailing the nature of the covert agent's activities for the CIA. That information would have absolutely no bearing on the criminal acts alleged in the indictment.

Similarly, the fact that the defendant may have supplied information to the CIA regarding foreign countries he visited is immaterial to the financial management of BBRDW. The court is not persuaded that such evidence is even circumstantially related to the creation and management of the defendant's company.

The court agrees with defendant that circumstantial evidence is no less probative than direct evidence, and that this is especially true on the issue of intent in fraud cases. See, e.g., United States v. Andrino, 501 F.2d 1373 (9th Cir. 1974); United States v. Foshee, 606 F.2d 111 (5th Cir. 1979), cert. denied, 444 U.S. 1082 (1980). The court finds, however, that much of the information sought in defendant's 1,717 discovery requests would not be probative on any issue relevant to this case.

The defendant argues that he is entitled to discover all classified information regarding any individual he ever met or who may have come into contact with his company. The crux of defendant's argument is that he should be entitled to discover all such information because the existence of any classified information on these persons makes more probable his claim that the CIA established his company as a proprietary organization.

Such an onerous fishing expedition will not be condoned by this court. It is now well-settled that the mere fact that classified information is at issue will not diminish a defendant's right to use such relevant information in his defense. See United States v. Smith, 750 F.2d 1215 (4th Cir.

1984); United States v. Wilson, 750 F.2d 7 (2d Cir. 1984); United States v. Collins, 720 F.2d 1195 (11th Cir. 1983). Conversely, however, the fact that classified information is at issue does not expand a defendant's discovery rights.

Finally, there are two additional points raised by defendant to which the court needs to respond. Defendant argues that the court has denied him the opportunity to present a detailed showing of the relevance of each of his discovery requests, and that he has been prejudiced by the "numerous ex parte showings" made by the government to the court.

As to the first contention, the court notes that the defense originally served its interrogatories upon the government on January 18, 1985. As of that date the defense had presumably developed it's theory as to how each of those requests sought relevant information. Almost three months later, on April 8, 1985, the defendant filed his motion to compel in which he was free to make whatever showing of relevance he deemed necessary. Further, at the hearing on April 22, 1985, the defense again had the opportunity to advance its arguments on the issue of relevance. The defendant secured an additional opportunity through this motion for reconsideration.

The court believes that the defendant has been provided with more than an adequate opportunity to make his showing of relevance.

As to the defendant's second contention, the only ex parte showings which the government has made to the court have

been those required by CIPA. Section 4 of CIPA provides:

> The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

In compliance with this section, the court has reviewed, in camera, affidavits and documents submitted by the government in support of various substitutions proposed by the government. That in camera review, acknowledged by the court in its May 1, 1985 discovery order, is the only ex parte showing which the government has made to the court.

ACCORDINGLY, for the foregoing reasons, the motion for reconsideration is hereby DENIED.

DATED: Honolulu, Hawaii, JUN 10 1985

UNITED STATES DISTRICT JUDGE